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No. 99-950

IN THE

Supreme Court of the United States

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

DARLENE M. WIGHTMAN Administratrix of the Estate of Michelle L. Wightman Deceased; MICHELLE WIGHTMAN CHARITABLE FOUNDATION,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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February 1, 2000

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MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed under Rule 37.2(b). Petitioner has consented to AAR's filing of a brief.[1] Respondents have refused consent.

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR seeks to file a brief *amicus curiae* only when the case presents an issue of great significance to the

[1] The letter expressing consent has been filed with the Clerk of the Court.

railroad industry as a whole—and in those instances such requests have been granted.[2]

In this case, an AAR member was assessed $15 million in punitive damages after a trial at which it was deprived of its constitutional right to defend itself. The Ohio Supreme Court ultimately let stand this punitive damages award, which exceeded the underlying compensatory damages award by 6,250 times. In approving this grossly excessive award, the court denied petitioner due process by failing to pay heed to the constitutional parameters governing the awarding of punitive damages, which have been enunciated in recent decisions of this Court. The constitutional infirmities of the decision below are of particular concern to the railroad industry because railroads are increasingly finding themselves to be the targets of lawsuits seeking massive punitive damages awards.

When AAR appears before a court as *amicus curiae* it brings a broad, industry-wide perspective to the issue. AAR works closely with its member railroads' litigation counsel on issues typically associated with railroad litigation. AAR also maintains a close liaison with the National Association of Railroad Trial Counsel, an organization of nearly 1000 attorneys representing railroad companies in personal injury litigation. Therefore, AAR is thoroughly familiar with the trends and problems associated with railroad litigation, and in particular the looming specter of punitive damages facing railroads today.

As a trade association representing the nation's major railroads, AAR can assist this Court in understanding the

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[2] *E.g.*, *Consolidated Rail Corp. v. Wicker*, 119 S. Ct. 530 (1998); *CSX Transp., Inc. v. Sirbaugh*, 117 S. Ct. 1289 (1997); *Norfolk & Western Ry. Co. v. Chittum*, 117 S. Ct. 597 (1996); *Metro-North Commuter R.R. v. Buckley*, 117 S. Ct. 379-80 (1996). All granting motion of AAR to participate as *amicus curiae*.

impact of the lower court's rulings, by bringing the perspective of an entire industry, which often is different from that of the individual litigant who may not be in a position fully to be aware of a case's impact on the industry as a whole. In this case, AAR has an interest not only in assisting the petitioner in obtaining relief from an erroneous and constitutionally flawed decision, but also in establishing precedent that will be beneficial to all railroads that may face trials on punitive damages in the future.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST OF AMICUS CURIAE

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 75 per cent of the rail industry's line haul mileage, produce 93 per cent of its freight revenues, and employ 91 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry.

[1] No person or entity other than AAR has made monetary contributions toward this brief and no counsel for any party authored this brief in whole or in part.

One matter which is a serious and growing concern to railroads is the frequency with which juries are punishing defendants in general, and railroads in particular, in civil litigation through the imposition of substantial punitive damages awards. Railroads have a presence in 49 states, where 559 freight railroads operate over nearly 170,000 miles of track.[2] If an accident occurs involving a member of the general public, railroads often are subject to lawsuits under state law.[3] In 1998, railroad accidents and incidents involving the general public resulted in 1047 lawsuits being filed against railroads.[4] Railroads are tempting targets for punitive damages because their extensive interstate operations often puts them in a position to be portrayed in the litigation as wealthy out-of-state corporations. *See infra* pp. 7-9.

AAR has a particular interest in this case because it resulted in an award of substantial punitive damages against one of its member railroads following a trial marred by highly prejudicial errors left undisturbed by the state's highest court. These errors amounted to not

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2 Association of American Railroads, *Railroad Facts* 3 (1999 ed.). Amtrak, the nation's intercity passenger railroad, operates over 24,500 miles of track, most of which is owned by freight railroads. *Id.* at 77. The most common interaction between trains and the general public occurs at highway-rail grade crossings. As of 1998, there were 158,590 public grade crossings on the nation's rail system. Federal Railroad Administration, *Railroad Safety Statistics, Annual Report 1998 (1998 Safety Satistics)*, ch. 9, p.6 (July 1999) (Table 9-1).

3 Railroads generally are regulated under federal law, including the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, which covers workplace injuries. However, state tort law usually applies in cases where non-employees are injured, though, depending on the circumstances, some claims may be preempted. *See CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993).

4 Association of American Railroads, *1998 Claim & Litigation Report* 3-7 & 3-8 (Aug. 1999).

just a misapplication of state law and procedure, but also rose to the level of a violation of the constitutional rights of the defendant. As a representative of a significant portion of the rail industry, AAR has an interest in assuring that such proceedings are not conducted in a way that deprives railroads of their right to present an adequate defense as required by the United States Constitution.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case of Petitioner.

SUMMARY OF THE ARGUMENT

The Due Process Clause prohibits states from assessing excessive punitive damages awards. In this case, arising from an accident at a grade crossing, the judge prohibited petitioner from presenting important, relevant evidence about the circumstances surrounding the accident. As a result, without hearing evidence that was essential to its ability to assess the reprehensibility of the petitioner's conduct—the most important factor in determining whether an award of punitive damages is excessive—the jury awarded the plaintiff $25 million in punitive damages (which was reduced to $15 million by the trial judge).

In recent years, railroads have had a number of immense punitive damages awards assessed against them, typically in cases arising from grade crossing accidents. Crossing accidents are unique, and the culpability of both the railroad and the motorist can only be properly assessed if all the facts and circumstances of the accident are presented to the jury. Allowing a jury to determine the amount of punitive damages to be awarded without permitting a railroad to present in its defense evidence about how the accident happened amounts to a deprivation of due process.

Petitioner was also deprived of its right to due process because the judge permitted the plaintiff's expert witness to offer evidence (about which plaintiff's counsel reminded the jury at closing argument) that over 1000 accidents, similar to the one in this case, had occurred in the past. However, no evidence was offered to connect petitioner with any of these past accidents or even to suggest that petitioner was aware of them. This error by the judge enabled the jury to punish petitioner for the alleged acts of other parties, a violation of due process.

ARGUMENT

I. RAILROADS HAVE A STRONG INTEREST IN ASSURING THAT DUE PROCESS IS AFFORDED BEFORE A STATE MAY IMPOSE A SUBSTANTIAL PUNITIVE DAMAGES AWARD

In this case, petitioner was assessed a penalty of $15 million after a trial in which it was prevented from telling the jury its side of the story. *Wightman v. Consolidated Rail Corp.*, 715 N.E.2d 546 (Ohio 1999). Whether petitioner ultimately is deserving of punishment for its conduct related to the grade crossing accident from which this case arose is not a question for this Court. However, that the proceeding which resulted in this punishment was fundamentally unfair should be of serious concern to this Court, which has held that "it is not disputed that a jury award [of punitive damages] may not be upheld . . . if it was reached in proceedings lacking the basic elements of fundamental fairness." *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 9 (1991) (quoting *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989)).[5]

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[5] This Court has left no doubt that the Due Process Clause of the Fourteenth Amendment is applicable to the awarding of puni-

In *BMW of North America v. Gore*, 517 U.S. 559 (1996), this Court held that the Due Process Clause "prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor" 517 U.S. at 562,[6] and articulated three guideposts which are relevant to the question of whether an award of punitive damages is consistent with constitutional principles: the reprehensibility of the conduct to be punished; the disparity between the compensatory and punitive damages awards; and the difference between the punitive damages and civil or criminal penalties that could be imposed for comparable misconduct. 517 U.S. at 574-75. At least in some cases, these guideposts have resulted in greater scrutiny of punitive damages awards by appellate courts.[7] However, a reviewing court is removed from the evidence and testimony heard by the members of a jury actually charged with awarding punitive damages. The nature of that evidence cannot but greatly affect how the jury members view the facts of a case, and, in particular, how they assess "the degree of reprehensibility of the defendant's conduct," which this Court has stated is "the most important in-

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tive damages. *BMW of North America v. Gore*, 517 U.S. 559 (1996); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Haslip supra*, and that proceedings to determine the amount of punitive damages must be conducted in a manner that provides "assurances that those whose conduct is sanctionable by punitive damages are not subjected to punitive damages of arbitrary amounts." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 429 (1994).

[6] Specifically, a party must "receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." 517 U.S. at 574.

[7] *See, e.g., Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997) ($5 million punitive damages award reduced to $350,000); *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634 (10th Cir. 1996), *cert. denied*, 117 S.Ct. 1846 (1997) ($30 million punitive damages award reduced to $6 million).

dicium of the reasonableness of a punitive damages award." *Gore*, 517 U.S. at 575. Moreover, reviewing courts cannot effectively ascertain whether the *Gore* guideposts warrant affirmance or reversal of a punitive damages award when key evidence has been improperly excluded (or admitted).

The case below is a stark case in point. The trial court's failure to adhere to the basic constitutional principles that must be followed in trials on punitive damages deprived petitioner of its right to present vital and relevant evidence to defend itself against punishment.[8] (Not surprisingly, the jury returned an award that, even after a subsequent remittitur, exceeded the compensatory award by over 6,000 times.) Therefore, as petitioner argues, this case presents an excellent opportunity for this Court to provide important guidance on the rights of defendants to present evidence in their favor when they stand at risk of punitive damages in a civil proceeding. Such guidance is urgently needed because civil lawsuits have become a common forum for punishing conduct deemed wrongful, making this an issue of vital and immediate interest to railroads, and by all accounts, to other potential defendants, be they private business corporations or other corporate and non-corporate entities.

A. Railroads Have Increasingly Become Targets for Punitive Damages

The railroad industry has seen great innovation since the days when steel wheels and rail came together to form a new mode of transportation. And, as they prepare to

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[8] The unfairness of the trial was further compounded by the Ohio Supreme Court's refusal to address, much less act on, petitioner's motion seeking the recusal of two members of the court who had been the beneficiaries of substantial campaign contributions from the plaintiff's lawyer, his partners and their families during the pendency of the appeal. *See Petition for Certiorari*, Part I.A.

enter a new century, railroads are relying increasingly on sophisticated computerized systems. However, the basic technology has remained the same, and still serves the industry in good stead. Rail operations involve the movement of heavy equipment, in all kinds of environments, in some cases hauling hazardous materials, in proximity to employees, passengers and, frequently, the general public. Despite the industry's vastly improved safety record over the past two decades,[9] given the nature of rail operations some accidents are inevitable. Just as inevitable are lawsuits, which, with increasing frequency, seek punishment in addition to compensation.

Recently, the railroad industry has been shocked by enormous, and heretofore unheard of, awards of punitive damages. Earlier this year, a Missouri jury awarded the staggering sum of $120 million in punitive damages to a plaintiff injured in an accident at a rail-highway grade crossing between an Amtrak train and an automobile in which she was a passenger. *Alcorn v. Union Pacific R.R.*, No. CV-97-31927 (Circuit Court, Jackson County, Mo.) (the court has reduced the award of punitive damages to $50 million.) Another award of $50 million in punitive damages was returned by a jury, and affirmed by an appellate court, in a Florida wrongful death action arising from the derailment of an Amtrak train in South Carolina. *Palank v. CSX Transp., Inc.*, 1999WL641885 (Fla. App. 4 Dist.) (1999) (unpublished opinion).[10] Of almost

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[9] During the past twenty years, the number of railroad accidents declined by 72 percent, Federal Railroad Administration, *Accident/Incident Bulletin, Calendar Year 1979* at 9 (1980) (Table H3) and *1998 Safety Statistics* at ch. 1, p. 7 (Table 1-1), and the number of fatalities from grade crossing accidents decreased by 48 percent. Federal Railroad Administration, *Rail-Highway Crossing Accident/Incident and Inventory Bulletin, Calendar Year 1979* at 8 (1980) (Table 3) and *1998 Safety Statistics* at ch. 7, p. 6 (Table 7-1).

[10] The punitive damages award in *Palank* was upheld despite a Florida statute containing a general cap on punitive damages.

equal size was a punitive damages award of $44 million in a case arising from a crossing accident in El Paso, Texas. *Atchison, Topeka & Santa Fe Ry. Co. v. Cruz.*, No. 08-97-00639-CV (County Court at Law No. 4, El Paso County, Tx.) (An appellate court subsequently struck the award of punitive damages. The case has been appealed to the Texas Supreme Court.)

In another case, petitioner was assessed $6 million in punitive damages as the result of a crossing accident in which it was alleged to have failed to install adequate warning devices at a crossing which had been upgraded with federal funds. *Garrett v. Consolidated Rail Corp.*, 697 N.E.2d 1109 (Ohio App. 1997). The award of punitive damages in *Garrett* was particularly troublesome for the industry, not only because of the immense disparity between the compensatory and punitive damages,[11] but also because the court held that Conrail could be liable for punitive damages because it did not "voluntarily [take] steps to evaluate the safety of its crossings nor independently upgrade its hazardous crossings without an order from the PUCO" (the state agency with jurisdiction over rail-highway grade crossings). 697 N.E.2d at 1124. This multimilion dollar award of punitive damages was affirmed by a state appellate court despite the fact that at the time of the decision, the Fifth, Eighth and Tenth Circuits all had clearly held that where federal funds participate in the installation of crossing warning devices, state law duties to install different or addi-

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[11] As was the case here, in *Garrett*, the punitive damages award was based on a small compensatory damages award for property loss—in that case, of $100—used by the plaintiff as a stalking horse for an appeal to the jury to deliver a massive punitive damages award on a wrongful death claim which, under Ohio law, cannot serve as the basis for a punitive damages award. *See Petition for Certiorari* at 22, n.4. The resulting ratio of punitive to compensatory damages was 60,000 to 1.

tional devices are preempted.[12] Thus, Conrail was severely punished for conduct which, according to three federal courts of appeal (covering 16 states), would have given rise to no obligation in compensatory damages, let alone punitive damages.

Perhaps the most stunning verdict against a railroad was a punitive damages award of $2.5 billion in Louisiana in the case of a leaking tank car.[13] *In re: New Orleans Train Car Leakage Fire Litigation*, No. 87-16374 (Civil District Court for the Parish of Orleans, La.). This incident resulted in the precautionary, temporary evacuation of several thousand people from their homes, but caused no serious injuries. In a ruling on post trial motions, the court recently reduced the punitive damages award to a "mere" $850 million.[14]

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[12] *See Hester v. CSX Transp., Inc.*, 61 F.3d 382 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 815 (1996); *Elrod v. Burlington Northern R.R.*, 68 F.3d 241 (8th Cir. 1996); *Armijo v. Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188 (10th Cir. 1996). The issue of whether the participation of federal funds in a crossing upgrade is sufficient to trigger federal preemption of state law claims is currently before this Court. *Shanklin v. Norfolk Southern Ry. Co.*, 173 F.3d 386 (6th Cir.), *cert. granted*, 120 S. Ct. 370 (Oct. 18, 1999).

[13] This represented the punitive damages against only one railroad, CSX Transportation. Additional punitive damages awards, exceeding $100 million, were made against other railroads with some connection to the incident. These other railroads ultimately settled the case while post trial motions were pending.

[14] Railroads can get hit with substantial punitive damages awards even when the plaintiff's conduct was largely to blame for the accident, as was the case here, and in another case where Conrail was assessed multiple seven-figure punitive damages awards arising from a crossing accident where the driver of the car was found to be 55% at fault. *Moore v. Consolidated Rail Corp.*, Nos. 1995CV 01185; 1995CV01196; 1996CV00016 (Court of Common Pleas, Stark County, Ohio), *aff'd*, Nos. 1996-CA-00317; 1996-CA-00323 (Ohio App. 1996), *discretionary appeal denied*, 688 N.E.2d 1043 (1998).

B. Punitive Damages Awards Cannot Be Assessed in Accordance With the Requirements of Due Process When the Jury is Not Presented With Evidence of All the Facts and Circumstances of an Accident

While punitive damages have been awarded in a variety of cases, recent experience shows that, as in the case below, accidents between trains and motor vehicles at grade crossings result in litigation in which punitive damages are most likely to be sought and awarded against railroads. There are nearly 160,000 public crossings in the United States. *See supra* note 2. The conditions at crossings vary greatly: some are in congested urban areas, some in sparsely populated rural settings.[15] For many crossings, safety means automatic gates and lights which are activated when a train is approaching and occupying a crossing; others are made safe with passive warning devices, such as crossbucks and a variety of signs, which alert motorists and pedestrians to the presence of railroad tracks.[16]

Certainly, every crossing accident is unique. These accidents occur under a wide variety of circumstances, at

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[15] The Federal Highway Administration, which oversees the Federal Grade Crossing Safety Program (23 U.S.C § 130) recognizes that the conditions and characteristics of crossings vary greatly. "Due to the large number of significant variables to be considered, there is no single system of active control devices universally applicable to crossings." U.S.DOT, Federal Highway Administration, *Rail-Highway Crossings Study* 4-9 (1989).

[16] Congress has concluded that with respect to tens of thousands of crossings characterized by low traffic volumes, "[f]ew . . . have sufficient accident potential to justify train actuated protection." H.R. Rep. No. 93-118 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1859, 1893. The Secretary of Transportation has reached the same conclusion. (For thousands of crossings, "there is but a remote possibility of finding adequate justification for other than minimum protection of a static sign type." U.S. Dept. of Transp. Report to Congress: Railroad-Highway Safety Part I: A Comprehensive Statement of the Problem, at v (1971).)

crossings with all types of warning devices, during all times of day and at all times of year.[17] In each case, the conduct of both the motorist and railroad must be assessed in light of all the circumstances. Many factors, relating to both the condition of the crossing and the conduct of the motorist, are relevant to the potential danger posed by a railroad's conduct. In fact, given the characteristics of trains and motor vehicles, and the principles of physics, it is the driver who typically is in a far better position to avoid an accident.[18] Conduct of a party that appears reckless or egregious when presented from only one perspective, may be seen in a different light after all the evidence is heard.

In this case, the degree of reprehensibility of petitioner's conduct—that is, the degree to which its conduct created a hazard to the public—and, consequently, the degree to which petitioner was deserving of punishment, could only be fairly evaluated in light of all the circumstances surrounding the accident. Petitioner's inability to introduce evidence bearing on the circumstances of the accident deprived the jury of the opportunity to assess the

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[17] In 1998, accidents occurred at every hour of the day and night, and during each month of the year. *1998 Safety Statistics*, ch. 7, pp. 9-10 (Tables 7-4 & 7-6).

[18] In a comprehensive study of crossing accidents, the Interstate Commerce Commission found that the main cause of grade crossing accidents is the conduct of the motorist at the crossing. *See, Prevention of Rail-Highway Grade-Crossing Accidents Involving Railway Trains and Motor Vehicle*, ICC Report No. 33440, 322 I.C.C. 1, 63 (1964). The ICC further found that

> As between the engineer and the driver of a motor vehicle, the latter is in a far better position to control the movement of his vehicle than is the engineer of a train because of the difference between the adhesion of the train wheels to the rail and the contact between the motor vehicle wheels and the roadway.

Id. at 77-78.

reprehensibility of petitioner's conduct with all the relevant evidence before it. Had petitioner not been so restricted, it would have offered evidence that under the circumstances at the crossing on the night of the accident a motorist could have seen the approaching train in enough time to avoid the accident, and that the plaintiff's inexperience and impaired state, due to alcohol consumption, made the accident far more likely to occur. Surely, if it was relevant for the jury to hear from plaintiff's expert that petitioner's conduct made an accident inevitable, it was equally relevant for the jury to hear the defendant's expert testimony to the contrary.

This one-sided proceeding deprived petitioner of due process in accordance with the constitutional principles that guarantee the right to present witnesses in a party's defense. Indeed, when presented with evidence by both parties, the first jury (sitting in the liability phase of the trial) found plaintiff's contributory negligence to be 40 percent of the cause of the accident,[19] and the trial judge found that petitioner's conduct warranted no punitive damages [20]—a far cry from the results at the second trial. Regardless of whether the second jury would have found

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[19] While the Ohio Supreme Court dismissed the significance of this issue by narrowly defining it as a question of whether contributory negligence was at issue in the trial on punitive damages, 715 N.E.2d at 551, it is certainly significant, and has a bearing on the character of petitioner's conduct, that the jury which heard all the evidence found the plaintiff's conduct was almost as much to blame for the accident as was petitioner's conduct. *Cf. Chambers v. Mississippi*, 410 U.S. 284 (1973) (The state's hearsay and other rules of evidence may not be used to prevent a defendant from putting on relevant and reliable evidence in his defense.)

[20] Over petitioner's objection, this fact also was kept from the second jury, despite the Ohio Supreme Court's agreement that the "trial judge is in the best position to determine whether an award is so excessive as to be deemed a product of passion or prejudice. (citation omitted)" 715 N.W.2d at 553.

petitioner's evidence greatly persuasive, or discounted it entirely, fairness required that it should have been presented.

The emasculation of petitioner's defense at the second trial made it easy for the jury to improperly return a verdict based only on plaintiff's version of the facts. This erroneous deprivation of petitioner's right to due process led to an unconstitutionally excessive punitive damages award. As the dissent in the Ohio Supreme Court properly pointed out: "Due process and fundamental fairness require that the jury be informed of all of the circumstances in order to fully evaluate the defendant's conduct. . . . The second jury, in essence, heard only the plaintiff's version of the events." 715 N.E. 2d at 560 (Lundberg Stratton, J. dissenting).

C. Punitive Damages Awards Cannot Be Assessed in Accordance With the Requirements of Due Process When the Jury is Presented With Vague Evidence of Past Misconduct Unrelated to the Defendant

A second error by the trial court also resulted in a fundamentally unfair proceeding, depriving petitioner of due process. During the trial on punitive damages, the court permitted a plaintiff's expert witness to assert that over 1,000 accidents between automobiles and trains occur annually nationwide, and that a large number of those accidents had occurred under circumstances similar to the accident in this case. 715 N.E.2d at 551-52. Significantly, this opened the door for the jury improperly to punish petitioner for acts committed by other parties. Such evidence should not have been admitted, as it is axiomatic that a state may not exact punishment on a party for acts committed by others. *See Enmund v. Florida*, 458 U.S. 782, 798 (1982).

Urging the jury to deliver substantial punitive damages, the plaintiff in closing argument specifically called the

jury's attention to plaintiff's expert's testimony that many accidents have occurred under similar circumstances. While evidence of prior misconduct may be relevant for the purpose of determining reprehensibility of the conduct, *Gore*, 517 U.S. at 574, n.21 ("repeated misconduct is more reprehensible than an individual instance of malfeasance." *Id.* at 577), not only was no testimony offered about the particulars of any other "substantially similar" accidents, no evidence was offered that any of these other accidents either involved petitioner or were known to petitioner. In essence, plaintiff was asking the jury to punish petitioner for the alleged "sins" of the entire railroad industry. This violation of the constitutional principle of fundamental fairness was made possible by the court's erroneous evidentiary ruling.

Historically, the vast majority of crossing accidents have not involved petitioner. For example, in 1989, the year of the accident in this case, less than ten percent of crossing accidents *of all kinds* nationwide involved Conrail.[21] Clearly, general testimony about past crossing accidents, while highly prejudicial, may have little to say about petitioner's past conduct. Certainly, such testimony sheds absolutely no light on whether petitioner was ever involved in an accident occurring under circumstances similar to this case. By allowing such testimony, without any regard to where or how the prior accidents occurred, whether they involved petitioner and, if so, whether they bore any similarity to this case, the court relieved plaintiff's expert of any obligation to limit his testimony to that which was relevant to the issue of punitive damages. Had the jury been presented with specific evidence of similar past accidents involving petitioner, at least peti-

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21 Federal Highway Administration, *Rail-Highway Crossing Accident/Incident and Inventory Bulletin, Calendar Year 1989* at 10 (1990) (Table 7A).

tioner would have been in a position to attempt to rebut such evidence or argue why its past conduct did not warrant substantial punitive damages in this case.

The trial court's erroneous ruling, enabling the plaintiff to introduce evidence of a general nature, with no connection to the defendant or the defendant's conduct, subjected petitioner to a judgment without notice, in violation of the Due Process Clause. Taking a cue from the plaintiff's successful strategy here, plaintiffs in future railroad crossing and other accident cases will be tempted to implore the jury to punish the defendant for the acts of others, and will offer evidence of alleged misconduct of the entire industry. Without proper guidance from this Court, future defendants will run the risk of being held accountable, and punished, for acts they did not commit.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court grant the petition for a writ of *certiorari*.

Respectfully submitted,

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